

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NATHANIEL McKINNEY,

Petitioner,

v.

KELLY SANTORO,

Respondent.

No. 2:23-cv-00416 DB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Petitioner, a state prisoner, proceeds pro se and in forma pauperis with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The first amended petition filed on July 17, 2023 (ECF No. 9), is before the court for screening.

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived explicitly by respondent's counsel. 28 U.S.C. § 2254(b)(3).¹ A waiver of exhaustion may not be implied or inferred. A petitioner satisfies the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider all claims before presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

¹ A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C. § 2254(b)(2).

1 After reviewing the petition for habeas corpus, the court finds that petitioner has failed to
2 exhaust state court remedies. The claims have not been presented to the California Supreme
3 Court. Further, there is no allegation that state court remedies are no longer available to
4 petitioner. Accordingly, the petition should be dismissed without prejudice.²

5 Good cause appearing, IT IS HEREBY ORDERED as follows:

6 1. Petitioner's motion for extension of time to file a first amended petition (ECF No. 8) is
7 granted and the court accepts the first amended petition filed on July 17, 2023 (ECF No. 9) as the
8 operative petition;

9 2. The Clerk of the Court is directed to serve a copy of these findings and
10 recommendations together with a copy of the first amended petition filed in the instant case on
11 the Attorney General of the State of California;

12 3. The Clerk of the Court shall assign a district judge to this case; and

13 IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas
14 corpus be dismissed for failure to exhaust state remedies.

15 These findings and recommendations will be submitted to the United States District Judge
16 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
17 after being served with these findings and recommendations, petitioner may file written
18 objections with the court. The document should be captioned "Objections to Findings and
19 Recommendations."

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25 ² Petitioner is cautioned that the habeas corpus statute imposes a one year statute of limitations
26 for filing non-capital habeas corpus petitions in federal court. In most cases, the one year period
27 will start to run on the date on which the state court judgment became final by the conclusion of
28 direct review or the expiration of time for seeking direct review, although the statute of
limitations is tolled while a properly filed application for state post-conviction or other collateral
review is pending. 28 U.S.C. § 2244(d).

Petitioner is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: July 27, 2023


DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

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